

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

TIMOTHY ERWAY,

v.

05-CV-6726

JOANNE B. BARNHART,

ORDER

Defendant.

In a decision dated May 12, 2005, ALJ Eugene Wisniewski, after a hearing held on April 12, 2005 in Corning, New York, found that the plaintiff, Timothy Erway ("Erway") was not disabled within the meaning of the Social Security Act and, therefore, not entitled to disability insurance benefits or supplemental security income. Plaintiff claims that he has been disabled since December 25, 2002 due to a right arm and hand condition, neck and shoulder pain, knee problems, and diabetes. Pending before this Court is plaintiff's appeal seeking reversal of the ALJ's decision. Both the plaintiff and the Commissioner have filed motions seeking judgment in their favor pursuant to Federal Rule of Civil Procedure 12(c).

Following his hearing before the ALJ on April 12, 2005, plaintiff filed a subsequent application for disability benefits on December 14, 2005. That application was approved and he was found disabled as of May 13, 2005 and entitled to SSDI benefits as of November 2005. Therefore, what is at stake in this proceeding involves only his claim for benefits prior to November 2005 (the period December 25, 2002 to May 13, 2005). In the plaintiff's second claim, he was found to be disabled as of May 13, 2005 (the day following the ALJ's decision denying plaintiff's first

application for disability benefits). With respect to the second claim, the Commissioner found that plaintiff suffered from mental retardation with a secondary diagnosis of diabetic/peripheral neuropathy. The medical evidence in support of that finding reveals that on February 22, 2006, Helen Collins, Ph.D. examined Erway and diagnosed plaintiff with mild mental retardation, depression, panic disorder with agoraphobia, learning disorder, diabetes, frozen right shoulder, pain in knees, ankles, and a stiff neck. On the same date, Dr. Look Persaud, an internist, examined Erway and submitted a report revealing that Erway, then 43, was 5 foot 7 ½ inches tall and weighed 317 lbs. Dr. Persaud diagnosed plaintiff as suffering from morbid obesity, diabetes mellitus, and adhesive capsulitis, right shoulder. Other medical information in the file before this Court indicates Erway suffers from congestive heart failure, and sleep apnea. Much of the medical evidence supporting plaintiff's successful application filed on December 14, 2005 overlaps medical evidence existing in the record before this Court upon which the ALJ found that plaintiff is not disabled.

Plaintiff's Motion for Remand

Plaintiff, through his attorney Catherine Callery, moves this Court for a remand based upon the new and material evidence which supported his subsequent application for disability benefits. Alternatively, plaintiff seeks reversal of the ALJ's unfavorable decision dated May 12, 2005.

The Government, in a letter response dated July 15, 2008, indicates that it has no objection to remanding this case as

requested by plaintiff's counsel. Accordingly, the case is remanded to the Commissioner for further proceedings based on the evidence submitted by plaintiff Erway's attorney in her letter memorandum to this Court dated May 22, 2008. In remanding this action, the Court observes that the plaintiff, who was found disabled as of May 13, 2005 because of mental retardation, likely did not become mentally disabled during the night of May 12, 2005 - the date on which the ALJ found he was not disabled in his first application for benefits. A review of the medical evidence in the file reveals that essentially the same evidence concerning plaintiff's medical condition which supported the Commissioner's favorable decision dated February 28, 2006 existed prior to the onset date of May 13, 2005.

CONCLUSION

For the reasons stated above, the Court grants plaintiff's motion to remand and the case is remanded to the Commissioner for further proceedings consistent with this decision.

ALL OF THE ABOVE IS SO ORDERED.

S/Michael A. Telesca

Honorable Michael A. Telesca
United States District Judge
Western District of New York

DATED: Rochester, New York
July 16, 2008